BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDWIN CAMACHO	)	
Claimant	)	
VS.	)	
	)	
JOSE GUERRA, ADAN GUERRA-LAGUNA	)	
and SUNFLOWER STATE EXTERIORS, LLC	)	
Respondents	)	Docket No. 1,059,451
AND	)	
	)	
INSURANCE COMPANY UNKNOWN and	)	
AMERICAN INTERSTATE INSURANCE COMPANY	)	
Insurance Carriers	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

STATEMENT OF THE CASE

Respondent Sunflower State Exteriors, LLC, and its insurance carrier, American Interstate Insurance Company, appealed the April 18, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. Paul V. Dugan, Jr., of Wichita, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent Sunflower State Exteriors, LLC (Sunflower), and its insurance carrier, American Interstate Insurance Company (American Interstate). John C. Nodgaard of Wichita, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 7, 2013, preliminary hearing and exhibits thereto; the transcript of the May 1, 2012, preliminary hearing and exhibits thereto; the transcript of the April 18, 2012, deposition of claimant; the transcript of the January 17, 2012, deposition of Adan Guerra-Laguna and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant alleged he sustained two work-related injuries while working for respondent and filed applications for hearing in Docket Nos. 1,058,758 and 1,059,451. In Docket No. 1,058,758, claimant alleged that on November 5, 2011, he sustained an injury from a fall off a roof while at work. Claimant asserted his direct employer was Jose Guerra. In Docket No. 1,059,451, the current claim, claimant alleges he sustained a back injury by repetitive trauma. The Workers Compensation Fund was impleaded in both claims. In a September 13, 2012, Order issued in Docket No. 1,058,758, ALJ Barnes made several findings, including that Sunflower was the statutory employer of claimant. That Order was appealed to the Board, which affirmed ALJ Barnes' findings. In the present claim, claimant alleges, and Sunflower and American Interstate dispute, that Sunflower was the statutory employer of claimant.

In the current claim, claimant alleges that Jose Guerra and his brother Adan Guerra-Laguna are respondents. In a September 13, 2012, Order in Docket No. 1,059,451, ALJ Barnes determined Sunflower was the statutory employer of claimant and that claimant gave timely notice of the injury by repetitive trauma, but the ALJ impliedly found that claimant failed to sustain his burden of proving a back injury by repetitive trauma arising out of and in the course of his employment. She specifically found claimant failed to provide any medical evidence regarding the repetitive nature of the alleged back injury. That Order was not appealed to the Board.

Following a preliminary hearing in Docket No. 1,059,451, in an April 18, 2013, Order, ALJ Barnes again determined Sunflower was the statutory employer of claimant and that claimant gave timely notice of the injury by repetitive trauma. She found that claimant's date of injury was November 5, 2011, the last day he worked for respondent, and she impliedly determined claimant sustained a back injury by repetitive trauma arising out of and in the course of his employment with respondent. ALJ Barnes also impliedly found it was more likely than not that the prevailing factor for claimant's low back condition and need for medical care was his repetitive work-related activities, which were over and above claimant's routine activities of daily living. ALJ Barnes ordered respondent to provide the names of two treating physicians to claimant, so that claimant could choose one to provide medical treatment. The ALJ also ordered temporary total disability benefits if the authorized treating physician took claimant off work.

Sunflower and American Interstate asserted: (1) Sunflower was not claimant's statutory employer, (2) claimant did not give timely notice and (3) claimant failed to prove his back injury by repetitive trauma arose out of his employment, as claimant did not prove his back injury by repetitive trauma by a diagnostic or clinical test. The Fund adopted Sunflower and American Interstate's arguments, except it took no position on whether Sunflower was a statutory employer. Claimant requests the Board affirm the ALJ's findings.

The issues are:

1. Was Sunflower a statutory employer of claimant?

2. What is claimant's alleged date of injury by repetitive trauma?

3. Did claimant provide timely notice of his alleged back injury by repetitive trauma?

4. Did claimant's alleged back injury by repetitive trauma arise out of and in the course of his employment? Specifically, did claimant meet his burden of establishing his alleged back injury by repetitive trauma by a diagnostic or clinical test?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Pertinent facts from transcripts and exhibits attached thereto of claimant's April 18, 2012, deposition; Adan Guerra-Laguna's January 17, 2012, deposition; and the May 1, 2012, preliminary hearing

Claimant testified that he was employed as a roofer by Jose Guerra (Jose) for approximately two years, and in turn, Jose worked for Sunflower. Claimant denied working for any other employer in those two years. He does not speak English and required an interpreter to testify. His job duties were anything associated with roofing, including tearing off roofs, installing new roofs, cleaning up, and lifting rolls of roofing paper and bundles of shingles. The bundles of shingles weighed 30 to 40 pounds and he would sometimes have to carry them up a ladder onto a roof.

Claimant testified that when he worked for Jose, there would always be Sunflower signs in the yards of the homes being roofed. He did not recall ever working on a house where there was not a Sunflower sign in the yard. On November 5, 2011, there was a Sunflower sign at the job site where claimant alleges he was injured. Claimant observed trucks with Sunflower written on them arrive at the job sites. Sunflower workers would inspect the work that was being done. Claimant was paid $100.00 per day and would receive a $100.00 bonus when a job roofing a church was completed.

Each day claimant worked, he would go to Jose's home and Jose would then take claimant to the job site. When asked how Jose received money to pay claimant, claimant testified Sunflower would pay Jose using checks. According to claimant, Jose never mentioned working for any companies other than Sunflower. Claimant admits never seeing a contract, tax receipt, 1099 form or check stub showing Sunflower paid Jose for roofing jobs that claimant worked on. He testified that on several occasions he was with Jose

when Jose would pick up paperwork at the home of the owner or a supervisor of Sunflower. Claimant also overheard Jose say he had to stop by and pick up a check.

Claimant testified that when Jose was not present on a job, his brother Adan Guerra-Laguna (Adan) was in charge. When Jose was not at the job site, Adan would sometimes be given papers by Sunflower. Claimant testified that he was told by Jose the checks were made out to Adan and the documents were in the name of Adan, but the checks were for Jose. Claimant indicated he was never paid by Adan, only by Jose.

When asked if it was true that claimant had back problems and had seen a chiropractor before November 5, 2011, claimant testified, "Yes, while working for them I also was hurt for a while."[1] Claimant testified that approximately six months after he began working for Jose, he injured his back while lifting bundles. Claimant testified that he told Jose of the back pain and requested medical treatment, but Jose said there was "no help in his company."[2] Claimant indicated that he received chiropractic treatment once or twice a week for three months. The chiropractor did not inquire what claimant did for work. That treatment stopped between six months and a year before November 5, 2011. Claimant also took Tylenol for back pain. When he worked, claimant would use a back brace that he purchased.

On January 17, 2012, Sunflower deposed Adan, brother of Jose. Adan is an undocumented worker, does not speak English and required an interpreter. He testified that Sunflower gave Jose houses to work on and that he, Jose and claimant were workers for Sunflower. Sunflower would pay Jose, who would in turn pay Adan and claimant. When a roof needed roofing, Brad at Sunflower would call Jose. Adan testified Jose would then contact workers to assist him in roofing the house, and Adan and claimant were two of those workers. Jose had the necessary equipment to roof the houses, including shovels, ladders, hammers and roofing guns. Sunflower would bring the shingles to the job site. When Adan worked for Jose, two or three roofs a week would be completed. After a roof was completed, Sunflower would pay Jose. Adan testified that Jose did not have workers compensation insurance. Adan testified Jose moved back to Mexico four months earlier to take care of sick parents.

At his deposition, Adan testified that at times he and claimant would work for other jobs. That was because Jose would not always have enough work to keep them employed full time. However, as indicated above, at claimant's evidentiary deposition claimant testified that he had worked exclusively for Jose for approximately two years. Claimant testified he worked five days a week for Jose.

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[1] Claimant Depo. at 23.

[2] P.H. Trans. (May 1, 2012) at 23.

At Adan's deposition, a certificate of liability insurance was introduced which indicated Adan had workers compensation insurance from May 14, 2010, to May 14, 2011. Adan testified that he had never applied for workers compensation insurance and did not know how it came to be that his name was on the certificate. Nor was Adan previously aware of the certificate. A Form 1099-MISC, placed into evidence at the preliminary hearing, indicated that in 2011, Sunflower paid Adan $326,320.00 in non-employee compensation.

Adan indicated that at some point before claimant's November 5, 2011, ankle injury, claimant asked Jose for permission to leave work to see a physician for back pain. Adan testified Jose knew claimant was taking pills for pain and claimant sometimes did not come to work because of back pain. Adan also indicated that claimant said he had a bad back before he came to work for Jose. Adan testified:

> Q. (Mr. Dugan) Did the work that he did roofing houses for Jose make that pain worse or was it a constant pain?
>
> > Mr. Torline: And I'll raise my objection, that question asks Mr. Guerra to speculate what happened or was happening to Mr. Camacho, and so he lacks the foundation and you're asking him to speculate what was happening to Mr. Camacho.
>
> A. (Adan) He was worse of his -- he was every day worse because he say that he had problems also with his liver, he was worse every day.
>
> Q. Did Mr. Camacho, to your knowledge, ever have to leave work due to back pain?
>
> A. Yes, yes. Several times.[3]

Pertinent facts from the transcript and exhibits attached thereto of the March 7, 2013, preliminary hearing

Claimant testified that after he injured his back, he wore a back brace and took a week off work because of back pain. He then saw a chiropractor at Dopps Chiropractic Clinic. The records for Dopps indicated claimant received chiropractic treatment from December 22, 2010, through February 7, 2011. The December 22, 2010, chiropractic records of Dopps contain a chiropractic case history form that was signed by claimant. In the space to answer whether the condition is due to injury or sickness arising out of employment, "sickness" is printed. The same form indicates the symptoms began three weeks ago and that claimant had similar symptoms two years ago. Kevin Darden, D.C., diagnosed claimant with:

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[3] Guerra-Laguna Depo. at 43-44.

Degeneration of lumbarsacral *[sic]* intervertebral disc
Sacral Region
Lumbar Subluxation
Sciatic Neuritis[4]

Claimant also testified concerning his relationship with Jose and Adan and their relationship with Sunflower. That testimony was consistent with his testimony at the May 1, 2012, preliminary hearing. Claimant again testified that whenever he worked for Jose, there was a Sunflower sign in the yard. Claimant admitted he could not produce a written contract between Jose and Sunflower for roofing projects that he worked on.

The medical report of George G. Fluter, M.D., was made part of the record. He evaluated claimant on November 1, 2012. Claimant reported to Dr. Fluter of having no prior back injuries or problems. Dr. Fluter indicated that claimant reported his back pain began 11 months after he began working for Sunflower. Claimant reported the back pain to his employer, but no action was taken. Dr. Fluter did not order any diagnostic tests, nor did he review any of claimant's chiropractic records. The medical records he reviewed concern claimant's left ankle injury.

Dr. Fluter conducted an extensive physical examination of claimant and diagnosed claimant with: (1) middle/lower back pain, (2) lumbosacral strain/sprain, (3) myofascial pain affecting the lower back, (4) probable sacroiliac joint dysfunction and (5) probable trochanteric bursitis. He opined there was a causal/contributory relationship between claimant's back condition and his work-related activities and that claimant's work-related activities were the prevailing factor causing his back condition and need for medical treatment. He also indicated claimant's work activities were over and beyond routine activities of daily living. He then recommended, among other things, that claimant be prescribed medication to modulate pain symptoms and that claimant undergo imaging studies of the lumbar spine including x-rays, and possibly an MRI. In his report, Dr. Fluter stated, "The clinical findings of pain and tenderness affecting the lower back, sacroiliac joints, and trochanteric bursae are not inconsistent with conditions related to repetitive use, and diagnostic testing directed at the lower back, as best as I can tell, has not been done thus far."[5]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

[4] P.H. Trans. (March 7, 2013), Resp. Ex. 1.

[5] *Id.*, Cl. Ex. 1 at 5.

right depends.[6] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[7]

K.S.A. 44-503(a), the statutory employer provision of the Act, states:

> Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

In *Wheeler*,[8] the Kansas Court of Appeals set out when an employer is a statutory employer and stated:

> K.S.A. 44-503(a) "extends the application of the Kansas Workers Compensation Act to certain individuals or entities who are not the immediate employers of the injured workers, but rather are 'statutory employers.' [Citation omitted.]" *Robinett*, 270 Kan. at 98. Under this statute, "a principal will be liable to the employee of a subcontractor if the principal undertakes to do work which (1) is a part of the principal's trade or business, or (2) the principal has contracted to do for a third party." *Harper v. Broadway Mortuary*, 6 Kan. App. 2d 763, 764, 634 P.2d 1146 (1981). . . .

Claimant testified Sunflower placed signs in each and every yard of the homes Jose's crew roofed and Sunflower employees inspected the work. Adan testified Jose would roof two or three houses every week for Sunflower, while claimant said it was four houses a week. In 2011, Sunflower issued a Form 1099-MISC to Adan for more than

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[6] K.S.A. 2011 Supp. 44-501b(c).

[7] K.S.A. 2011 Supp. 44-508(h).

[8] *Wheeler v. Rolling Door Co.*, 33 Kan. App. 2d 787, 109 P.3d 1255 (2005).

$300,000.00. This Board Member finds there is sufficient evidence to establish Jose, the subcontractor, performed work that was an integral part of Sunflower's business.

Sunflower and American Interstate asserted claimant failed to establish a contract for services existed between Sunflower, as principal employer, and Jose, as subcontractor. In Kansas a contract for services does not have to be in writing.[9] Here, Jose provided a roofing crew for Sunflower. After each roofing job was completed, Sunflower would pay Jose, who distributed the proceeds at his discretion among his workers. In their brief, Sunflower and American Interstate cite *Schafer*[10] and *Ellis*.[11] However, the facts in those cases are substantially different from the facts of this claim. In both of those cases it was very clear that the alleged statutory employer had no contract with the subcontractor. In both cases the court also found that the work performed by the alleged subcontractor was not an integral part of the alleged statutory employer's business. Simply put, claimant has met his burden of proving that Sunflower was a statutory employer pursuant to K.S.A. 44-503(a).

In order to determine if claimant gave timely notice, the date of injury first must be established. In their briefs, neither Sunflower and American Interstate nor the Fund disputed ALJ Barnes' finding that the date of claimant's injury by repetitive trauma was November 5, 2011. Therefore, this Board Member finds that the date of claimant's injury by repetitive trauma was November 5, 2011.

Sunflower and American Interstate contend claimant failed to give notice directly to Sunflower of his injury by repetitive trauma until sometime after February 2, 2012. Claimant, however, testified he gave notice several times to Jose prior to November 5, 2011. That testimony is uncontroverted and is corroborated by Adan's testimony.

Sunflower and American Interstate assert claimant failed to meet his burden of establishing his alleged back injury by repetitive trauma by a diagnostic or clinical test. According to Sunflower and American Interstate, Dr. Fluter performed no clinical or diagnostic tests and recommended diagnostic tests for claimant. K.S.A. 2011 Supp. 44-508(e) states in part:

> "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be

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[9] *Bright v. Bragg*, 175 Kan. 404, 264 P.2d 494 (1953).

[10] *Schafer v. Kansas Soya Products Co.*, 187 Kan. 590, 358 P.2d 737 (1961).

[11] *Ellis v. Fairchild*, 221 Kan. 702, 562 P.2d 75 (1977).

> construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

Dr. Fluter did not order any diagnostic tests for claimant. He did recommend x-rays and, if necessary, an MRI. However, Dr. Fluter indicated there were clinical findings of pain and tenderness affecting the lower back, sacroiliac joints and trochanteric bursae, which he opined were not inconsistent with conditions related to repetitive use. Those clinical findings were made after an extensive physical examination, satisfy the requirements of K.S.A. 2011 Supp. 44-508(e) and are uncontroverted. Therefore, this Board Member finds claimant proved that his back injury by repetitive trauma arose out of and in the course of his employment with respondent.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[13]

CONCLUSION

1. Sunflower was a statutory employer of claimant.

2. Claimant's date of injury by repetitive trauma was November 5, 2011.

3. Claimant provided timely notice of the accident to Jose.

4. Claimant's back injury by repetitive trauma arose out of and in the course of his employment. Specifically, claimant demonstrated through clinical testing that he sustained a back injury by repetitive trauma.

WHEREFORE, the undersigned Board Member affirms the April 18, 2013, Order entered by ALJ Barnes.

IT IS SO ORDERED.

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[12] K.S.A. 2011 Supp. 44-534a.

[13] K.S.A. 2012 Supp. 44-555c(k).

Dated this ____ day of July, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

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